

**Before the
Federal Communications Commission
Washington, D.C.**

In the Matter of)	
)	
Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of <i>Computer Inquiry</i> and Title II Common-Carriage Requirements)	WC Docket No. 04-405

**Reply Comments
Of
The Nebraska Rural Independent Companies**

I. Introduction

The Nebraska Rural Independent Companies (the “Nebraska Companies”)¹ hereby submit reply comments in the above captioned proceeding. The Nebraska Companies appreciate the opportunity to reply to comments filed in response to the Federal Communications Commission’s (“FCC”) Public Notice² seeking comment on a petition (the “Petition”)³ filed by BellSouth Telecommunications, Inc. (“BellSouth”) for forbearance from Title II common carriage requirements that apply to incumbent local

¹ Companies submitting these collective comments include: Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telco, Inc., Consolidated Telecom, Inc., Consolidated Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Company, Inc., K&M Telephone Company, Inc., Nebraska Central Telephone Company, Northeast Nebraska Telephone Co., Rock County Telephone Company, Stanton Telephone Co., Inc. and Three River Telco.

² See Public Notice, Comments Invited on Petition for Forbearance Filed by BellSouth Telecommunications, Inc. Regarding Incumbent LEC Provision of Broadband, WC Docket No. 04-405, DA 04-3507 (rel. Nov. 3, 2004).

³ See *Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Title II Common-Carriage Requirements*, WC Docket No. 04-405, Petition for Forbearance (filed Oct. 27, 2004).

exchange carrier (“ILEC”) broadband transmission. BellSouth also seeks forbearance from the *Computer Inquiry* rules to the extent that they require ILECs to tariff and offer the transport component of their broadband services on a stand-alone basis and to take service under those same terms and conditions.

In their comments, the Nebraska Companies stated their belief that issues such as those raised in the Petition should be addressed in a comprehensive rulemaking proceeding, as a ruling on this Petition would affect not only BellSouth but all ILECs offering broadband transmission services.⁴ The Nebraska Companies concur with other commenting parties that made this same recommendation.⁵ The Commission currently has an open rulemaking proceeding addressing this issue⁶ and this proceeding is the appropriate mechanism in which to examine the issues raised in the Petition, as the issues can be considered in a comprehensive, instead of piecemeal, fashion.

The Nebraska Companies note that almost all commenting parties, with the exception of the Regional Bell Operating Companies (“RBOCs”), believe that the Petition does not meet the statutory requirements to grant forbearance. As explained in

⁴ See *Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Title II Common-Carriage Requirements*, WC Docket No. 04-405, Comments of the Nebraska Rural Independent Companies (“*Nebraska Companies’ Comments*”) (filed Dec. 20, 2004) at p. 2.

⁵ See *Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Title II Common-Carriage Requirements*, WC Docket No. 04-405, Opposition of CompTel/Ascent (“*CompTel Comments*”) (filed Dec. 20, 2004) at p. 2, and Comments of the Association for Local Telecommunications Service (“ALTS”) (“*ALTS Comments*”) (filed Dec. 20, 2004) at p. 2.

⁶ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, *Universal Service Obligations of Broadband Providers*, and *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10, Notice of Proposed Rulemaking, FCC 02-42 (“*Wireline Broadband NPRM*”) (rel. Feb. 15, 2002).

greater detail below, the Nebraska Companies join with many other commenters in recommending that the Commission deny the BellSouth Petition.

II. The Arguments Provided By BellSouth In Support Of Its Forbearance Petition Do Not Meet The Statutory Requirements To Grant Forbearance.

A. Enforcement Of The Title II Common Carriage And *Computer Inquiry* Requirements Is Necessary To Ensure That The Charges And Practices Are Just And Reasonable And Not Unjustly And Unreasonably Discriminatory.

There Is Not Sufficient Competition In The High-Speed Broadband Access Market To Ensure Just And Reasonable Charges.

BellSouth asserts that the enforcement of Title II common carriage and *Computer Inquiry* requirements is not necessary to ensure that rates are just and reasonable or that carriers do not engage in unjust or unreasonable discrimination.⁷ In support of this assertion, BellSouth offers statistics indicating that cable modem service is the primary provider of broadband connections to the Internet,⁸ and that high-speed access to the Internet are is provided by wireless and satellite carriers, and by electric companies.⁹

However, the Nebraska Companies, along with many other commenting parties, do not believe that the data presented by BellSouth indicates that a competitive market exists for the provision of high-speed Internet access that would ensure just and reasonable charges. The Nebraska Companies indicated that the presence of a few competitors in a market is a situation that economists refer to as an oligopoly.¹⁰ Many other commenters referred to the lack of competition in the market for broadband

⁷ See *Petition* at pp. 17-19, 29-31.

⁸ Id. at p. 8.

⁹ Id. at pp. 10-13.

¹⁰ See *Nebraska Companies' Comments* at p. 4.

transmission service.¹¹ Some of the commenting parties indicated that there are only two major competitors in any particular geographic market, and referred to the situation as a duopoly. Others noted that in the wholesale market there is often only one provider of broadband transmission service, as cable companies will not enter into agreements to offer their broadband transmission services on a wholesale basis. The comments of these parties serve to reinforce the Nebraska Companies' assertion that sufficient competition does not exist in the market for broadband transmission services to ensure just and reasonable charges.

If The Commission Were To Forbear From The Application Of The
Computer Inquiry Rules And Common Carriage Obligations,
Discriminatory Charges And Practices Could Result.

EarthLink states that the Petition fails to explain how, absent Title II regulation, information service providers ("ISPs") and competitive LECs will be protected from unjust and unreasonable discrimination.¹² Perhaps this omission is not accidental. Without Title II regulation, carriers may restrict access or charge discriminatory rates to information service providers. This view is shared by others filing comments in this proceeding. According to CompTel, with the removal of the *Computer Inquiry* and Title II common carrier regulations for all of its broadband services, BellSouth will be able to

¹¹ See *Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Title II Common-Carriage Requirements*, WC Docket No. 04-405, Opposition of CompTel/Ascent ("*CompTel Comments*") (Filed Dec. 20, 2004) at p. 11; AT&T's Opposition to Petition for Forbearance of BellSouth Telecommunications, Inc. ("*AT&T Comments*") (filed Dec. 20, 2004) at p. 9; Comments of EarthLink, Inc. in Opposition to the Petition ("*EarthLink Comments*") (filed Dec. 20, 2004) at p. 24; Comments of McLeodUSA Telecommunications Services, Inc. (filed Dec. 20, 2004) at p. 11; and Opposition of the Federation of Internet Solution Providers of the Americas ("FISPA") ("*FISPA Comments*") (filed Dec. 20, 2004) at p. 33.

¹² See *EarthLink Comments* at p. 18.

refuse competing ISPs access to its broadband transmission facilities if it so desires.¹³ Under these circumstances, the Commission cannot possibly find that forbearance will promote competitive market conditions and enhance competition.¹⁴ AT&T asserts that “BellSouth seeks the Commission’s permission to discriminate at will against and between non-affiliated carriers, ISPs, and service and applications providers in its essential last-mile broadband transmission capabilities (if and when it chooses to provide those parties with any access at all), and to deny non-affiliates any recourse under the Title II complaint process.”¹⁵ At best, BellSouth will charge higher prices to rivals for essential inputs, provide them with poor quality interconnection, or impose unnecessary delays.¹⁶ FISPA noted that a grant of forbearance may well be the final nail in the coffin of an entire sector of broadband service providers-the independent ISPs.¹⁷ These comments clearly indicate that without the imposition of the *Computer Inquiry* rules and common carriage requirements, discriminatory charges and practices could result in the provision of ILEC broadband transmission service.

BellSouth Has Mischaracterized The Commission’s Findings With Regard To The Need For The Application Of The *Computer Inquiry* Rules And Common Carriage Obligations To Cable Companies Providing Cable Modem Service.

BellSouth argues that because the *Computer Inquiry* rules and common carriage obligations were not applied to cable companies’ cable modem service, such

¹³ See *CompTel Comments* at pp. 5-6.

¹⁴ *Ibid.*

¹⁵ See *AT&T Comments* at p. 11.

¹⁶ See *ALTS Comments* at p. 7.

¹⁷ See *FISPA Comments* at p. 45.

requirements should not be applied to ILEC broadband transmission as well.¹⁸ BellSouth claims that the *Computer Inquiry* and common carriage rules were not applied to cable modem service “because the market for broadband transmission is so competitive.”¹⁹

The Commission did not take the presence of competition into account in declining to apply such rules to cable modem service providers. The Nebraska Companies agree with CompTel and EarthLink that the Commission’s cable modem determination was premised on its conclusion that “cable modem service as currently provided is an interstate information service, not a cable service, and there is no separate telecommunications service offering to subscribers or ISPs.”²⁰ The Commission did not waive the *Computer Inquiry* and common carrier obligations for cable modem service on the basis that the market for broadband transmission is competitive. Therefore, it is not appropriate to waive such obligations for wireline broadband service, even if the retail and wholesale markets were found to be competitive.

The Impending Supreme Court Ruling In The *Brand X Internet Services v. FCC* Case Is Relevant To BellSouth’s Petition.

BellSouth asserts that an impending ruling by the Supreme Court in the *Brand X Internet Services v. FCC* case²¹ has no impact on the ability of the Commission to forbear from imposing Title II obligations on ILEC broadband transmission.²² The Nebraska Companies believe that the Petition does not meet the statutory requirements for

¹⁸ See *Petition* at pp. 3-5.

¹⁹ *Id.* at p. 3.

²⁰ See *CompTel Comments* at p. 2, *EarthLink Comments* at p. 27.

²¹ See *Brand X. Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

²² See *Petition* at pp. 5-6.

forbearance as explained throughout these comments. However, the Nebraska Companies, along with other commenters, also believe that the appeal of the *Brand X* case is relevant to the request for forbearance in the Petition.

If the Ninth Circuit decision is upheld by the Supreme Court, the decision would provide another reason why the Petition should be denied, as it would gut BellSouth's disparate treatment arguments.²³ If the Supreme Court upheld the Ninth Circuit finding that cable modem service contains a telecommunications service component, the Commission should reverse its previous decisions regarding cable modem service, and apply Title II obligations to the telecommunications service component of cable modem service. Title II regulation would prevent carriers from restricting access or charging discriminatory rates to certain ISPs. As discussed below, comparable access to broadband transmission services is necessary to ensure that a variety of ISPs remain in the market to spur innovation, and to ensure that bundled ISP and broadband transmission offerings remain just and reasonably priced.

Retention Of The Title II Common Carrier Obligations Is Critical To Maintaining Just And Reasonable Rates For Basic Local Exchange Service For Many Rural, High-Cost Carriers.

The elimination of Title II regulation from wireline broadband service would require all carriers offering such service to move the portion of the investment and expenses related to broadband service to a deregulated category. The ultimate effect would be a decrease in universal support and an increase in the price of both broadband service and an increase in basic local exchange rates. A rate increase for broadband service would in turn decrease demand for the service and will likely impede the progress

²³ See *CompTel Comments* at p. 3.

of broadband deployment in rural areas.²⁴ These facts run contrary to BellSouth's assertion that the current regulatory regime is not necessary to serve the public interest and is contrary to the public interest.²⁵ Furthermore, it is likely rates for basic local exchange service in rural areas would need to be increased to a level such that it would violate Section 254(b)(3) of the Telecommunications Act of 1996, which requires that rates in rural areas be reasonably comparable to rates for similar services offered in rural areas.

B. Forbearance Is Not Consistent With The Public Interest, As It Would Limit Innovation.

In the information services market, independent ISPs have played a crucial entrepreneurial role²⁶ in producing the "vibrant and competitive free market that presently exists for the Internet"²⁷ the Commission correctly seeks to preserve.²⁸ As FISPA asserts, its members and their independent ISP counterparts have and will continue to make significant contributions to the national economy, advanced communications capabilities, and the extension of broadband services to smaller communities -- helping to counter the so-called "digital divide."²⁹ If the Commission

²⁴ See *Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Title II Common-Carriage Requirements*, WC Docket No. 04-405, National Telecommunications Cooperative Association Initial Comments, (filed Dec. 20, 2004) at p. 2.

²⁵ See *Petition* at p. 32.

²⁶ See CFA: Administration's Broadband Policy Would Strangle ISPs, Destroy Competitive Internet Marketplace; available at http://www.consumerfed.org/070102_broadband_release.html.

²⁷ 47 U.S.C. § 230(b)(2).

²⁸ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, *Internet Over Cable Declaratory Ruling, and Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (rel. Mar. 15, 2002) at para. 4.

²⁹ See *FISPA Comments* at p. 3.

were to stifle the ability of innovative entrepreneurs to gain nondiscriminatory access to broadband transmission facilities, thereby curtailing their ability to freely deliver information services to consumers, not only would it run counter to Congressional intent and the legal principle of open access to essential facilities, but it would violate one of its own goals.³⁰

C. Forbearance Is Not In The Interest Of Consumers.

Consumers May Be Harmed By Lifting The *Computer Inquiry* Rules And Common Carriage Requirements.

BellSouth argues that the *Computer Inquiry* rules harm consumers by raising costs and impeding competition.³¹ BellSouth claims that complying with *Computer Inquiry* requirements cost it about \$45.28 annually per customer utilizing its broadband network. It asserts that these increased costs diminish competitive pressure on cable modem rates.

However, BellSouth fails to recognize that without the *Computer Inquiry* rules and common carriage requirements, competition between ISPs, which are the providers of retail service to the consumer, would be greatly diminished, which would likely result in higher rates for consumers. In its Petition, BellSouth claims that “no regulatory rule is necessary to ensure independent ISPs access to BellSouth’s network,” asserting that it “has every incentive to negotiate mutually beneficial network-access arrangements with these companies.”³² BellSouth additionally asserts that it “might seek to negotiate

³⁰ See *Nebraska Companies' Comments* at pp 10-11.

³¹ See *Petition* at p. 21.

³² *Id.* at p. 28.

private-carriage arrangements that would be tailored to the unique circumstances of particular ISPs just as cable companies have done.”³³

As noted above, if the Petition is granted there is no assurance that unreasonable discrimination against ISPs will not occur. CompTel believes that without regulations in place, nothing would stop BellSouth from offering “take it or leave it” deals incorporating terms that would make it difficult, if not impossible, for competing ISPs to survive.³⁴ According to FISPA “operating in a private carriage mode, BellSouth would be under no obligation to serve a party, such as an unaffiliated ISP, making a reasonable request for service.”³⁵ BellSouth has no incentive to fairly negotiate private contractual arrangements with small, independent ISPs. It is clear that through the use of the word *negotiate*, BellSouth has given an indication of the means by which it would pursue its own business objectives.³⁶ If the Petition is granted, BellSouth will have the upper hand and the ability to force unfavorable contractual arrangements onto small ISPs.³⁷

Furthermore, BellSouth provides no evidence that demonstrates that cable companies have even negotiated private-carriage arrangements. According to EarthLink “the fact remains that cable, with certain limited exceptions, continues to refuse to sell its transmission service to unaffiliated ISPs.”³⁸ And as demonstrated by FISPA, not bound by the requirements of Sections 201 and 202, the cable industry has refused to open their

³³ Ibid.

³⁴ See *CompTel Comments* at p. 16.

³⁵ See *FISPA Comments* at p. 6.

³⁶ See *Nebraska Companies' Comments* at p. 10.

³⁷ Id. at p. 9.

³⁸ See *EarthLink Comments* at p. 19.

lines or to partner with small ISPs.³⁹ Therefore, forbearing from enforcing the *Computer Inquiry* rules and common carriage requirements on ILEC broadband transmission service would harm consumers, as it would severely limit consumer choice of ISPs with broadband transmission capability.

III. Conclusion

The Nebraska Companies concur with many other commenting parties in recommending that the Commission should dismiss the BellSouth Petition, and continue to apply the *Computer Inquiry* rules and Title II common carriage requirements to ILEC broadband transmission service. As indicated in the introduction, the Nebraska Companies, as well as other commenters, believe that the issues raised by the BellSouth Petition should be addressed through the *Wireline Broadband NPRM*, which provides a comprehensive framework for examining changes in regulation of ILEC broadband transmission services.

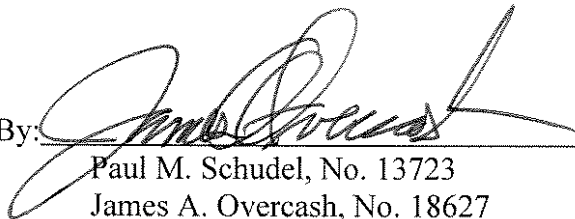
³⁹ See *FISPA Comments* at p. 28.

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Respectfully submitted,

The Nebraska Rural Independent Companies

Clarks Telecommunications Co.,
Consolidated Telco, Inc.,
Consolidated Telecom, Inc.,
Consolidated Telephone Company,
Eastern Nebraska Telephone Company,
Great Plains Communications, Inc.,
Hartington Telecommunications Co., Inc.,
Hershey Cooperative Telephone Company, Inc.,
K&M Telephone Company, Inc.,
Nebraska Central Telephone Company,
Northeast Nebraska Telephone Co.,
Rock County Telephone Company,
Stanton Telephone Co., Inc. and
Three River Telco

By: 

Paul M. Schudel, No. 13723
James A. Overcash, No. 18627
WOODS & AITKEN LLP
301 South 13th Street, Suite 500
Lincoln, Nebraska 68508
(402) 437-8500
(402) 437-8558 Facsimile